85-1390

No. _____

Supreme Court, U.S.
FILED
JAN 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

FRANCES ARMSTRONG, EMMA WEBBER,
JOHN FEDOR, JR.,

Petitioners,

vs.

W. BRUCE THOMAS, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DOUGLAS G. COLE, Esquire
STRAUSS, TROY AND
RUEHLMANN CO., L.P.A.
2100 Central Trust Center
201 East Fifth Street
Cincinnati, Ohio 45202
(513) 621-2120

MARVIN KARP, Esquire
ULMER, BERNE, LARONGE,
GLICKMAN & CURTIS
900 Bond Court Building
Cleveland, Ohio 44114
(216) 621-8400

Attorneys for Petitioners

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

QUESTIONS PRESENTED

I. Whether members of a class who enter an appearance in a pending class action and who file a timely notice of appeal have the right to appeal issues determined by the trial court but abandoned on appeal by the class representatives.

II. Whether in the above situation, a federal circuit court of appeals has the discretionary authority to permit such appeal by unnamed class members?

PARTIES TO THE PROCEEDINGS

Petitioners are Frances Armstrong, Emma Webber, and John Fedor, Jr., three former shareholders of respondent Marathon Oil Company at the time of a tender offer for a majority of Marathon shares by respondent U.S. Steel Corporation in November, 1981, and a subsequent March, 1982, freeze-out going private merger when Marathon became a wholly-owned subsidiary of U.S. Steel. Petitioners are members of the plaintiff class of shareholders in the action originally brought by Irving and Charlotte Radol, and others as named class plaintiffs. During the course of the class action proceeding petitioners obtained separate counsel and entered a Notice of Appearance, on behalf of themselves and all other members of the class, while the action was pending in the United States District Court for the Southern District of Ohio. Thereafter petitioners filed a Notice of Appeal with respect to certain rulings of the trial court dismissing claims on behalf of the class.

Respondents are W. Bruce Thomas, William R. Roesch, David M. Roderick, United States Steel Corporation, USS Inc., USS Holdings Company, USS Merger Sub, Inc., Goldman Sachs & Co., Marathon Oil Company, Harold D. Hoopman, Charles H. Barre, Elmer H. Graham, W.E. Swales, Jack H. Herring, Victor G. Beghini, Neil A. Armstrong, James A.D. Geier, J.C. Haley, J.N. Land, Jr., Raymond C. Tower, Robert G. Wingerter, and the First Boston Corporation. Respondents are defendants and were appellees below.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	v
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANT OF WRIT	8
POINT I: IT WAS A DENIAL OF DUE PROCESS AND AGAINST ESTABLISHED JUDICIAL PROCEDURE FOR THE SIXTH CIRCUIT COURT OF APPEALS TO DISMISS THE ARMSTRONG PLAINTIFFS' APPEAL FROM FINAL JUDGMENT, WHEN THEIR APPEAL WAS AS OF RIGHT PURSUANT TO THEIR FILING OF A NOTICE OF APPEARANCE WITH THE TRIAL COURT AND A TIMELY NOTICE OF APPEAL	8
POINT II: IT WAS WITHIN THE INDEPENDENT, INHERENT POWERS OF THE SIXTH CIRCUIT TO ALLOW PETITIONERS FULL APPELLATE PARTICIPATION, AND IT WAS THEREFORE A DENIAL OF DUE PROCESS AND AGAINST PROPER JUDICIAL PROCEDURE FOR THE COURT TO REFUSE TO CONSIDER THE APPROPRIATENESS OF PETITIONERS' INTERVENTION AT THE APPELLATE LEVEL FOR PURPOSES OF REVIEWING SUBSTANTIVE ISSUES WHICH	

Page

THE NAMED CLASS PLAINTIFFS HAD ABANDONED ON APPEAL 12

CONCLUSION 15

CERTIFICATE OF SERVICE 16

APPENDICES

A. Partial Transcript of Oral Argument Before a Panel of the United States Court of Appeals, Sixth Circuit, on January 22, 1985 ..... 1a

B. Notice of Appeal (Trial Court) of August 9, 1983 . 6a

C. Notice of Appeal (Trial Court) of September 19, 1983 ..... 8a

D. Order of September 26, 1985 ..... 10a

E. Order of November 1, 1985 ..... 11a

F. Relevant Statutory Provisions 12a

TABLE OF AUTHORITIES

Cases:	Page
Ace Heating & Plumbing Co. v. *Crane Co.*, 453 F.2d 30 (3d Cir. 1971)	10
Adams v. *Morton*, 581 F.2d 1314 (9th Cir. 1978), *cert. denied*, 440 U.S. 958 (1979)	12
American Pipe & Construction Co. v. *Utah*, 414 U.S. 538 (1974)	9
Armstrong v. *Board of School Directors*, 616 F.2d 305 (7th Cir. 1980)	10
Armstrong v. *Marathon Oil Co.*, Case No. 5-84-9 (Ct.App., Hancock County, Ohio, January 14, 1986)	7
Auerbach v. *Bennett*, 408 N.Y.S. 2d 83 (1978), *modified* 419 N.Y.S. 2d 920 (1979)	13
Cohen v. *Young*, 127 F.2d 721 (6th Cir. 1942)	9
Cooper v. *Federal Reserve Bank*, ____ U.S. ____, 104 S.Ct. 2794 (1984)	11
Dosier v. *Miami Valley Broadcasting Corp.*, 656 F.2d 1295 (9th Cir. 1981)	9
Fickle v. *Adkins*, 385 So. 2d 1141 (Fla. Dist. Ct. App. 1980)	11
Holland v. *Board of Public Instruction of Palm Beach County, Florida*, 258 F.2d 730 (5th Cir. 1958)	13
Jordan v. *Global Natural Resources, Inc.*, 102 F.R.D. 45 (S.D. Ohio 1984)	14
Kornfield v. *Perl Mack Liquors, Inc.*, 567 P.2d 383 (Colo. 1977)	13
McCullough v. *Scott*, 109 S.E. 789 (N.C. 1921)	13
McKenna v. *Pan American Petroleum Corp.*, 303 F.2d 778 (5th Cir. 1962)	13

Page

Mires v. *Hogan*, 192 P. 811 (Okla. 1920) 13

Overby v. *United States Fidelity & Guaranty Co.*, 224 F.2d 158 (5th Cir. 1955) 12

Patterson v. *Stovall*, 528 F.2d 108 (7th Cir. 1976) 9

Piper v. *Central Louisiana Electric Co.*, 437 So. 2d 997 (La. App. 1983) 11

Preston v. *United States*, 284 F.2d 514 (9th Cir. 1960) ... 13

Radol v. *Thomas* 772 F.2d 244 (6th Cir. 1985) 1, 5

Re General Motors Corp. Engine Interchange Litigation, 594 F.2d 1106 (7th Cir.), *cert. denied*, 444 U.S. 870 (1979), *and later appealed*, *Oswald* v. *McGarr*, 620 F.2d 1190 (7th Cir. 1980) 10-11

Re Roth's Estate, 52 A. 2d 811 (N.J. 1947) 13

Research Corp. v. *Asgrow Seed Co.*, 425 F.2d 1059 (7th Cir. 1970) 9

Re Tomlinson's Estate, 359 N.E. 2d 109 (Ill. 1976) 13

Reynolds v. *National Football League*, 584 F.2d 280 (8th Cir. 1978) 9

Senter v. *General Motors Corp.*, 532 F.2d 511 (6th Cir.), *cert. denied*, 429 U.S. 870 (1976) 14

Stoller v. *Baldwin United Corp.*, Fed. Sec. L. Rep. (CCH) ¶ 91, 678 (September 19, 1984) 14

Tisdale v. *Wheeler Brothers Grain Co.*, 599 P.2d 1104 (Okla. 1979), *later proceeding*, *Abel* v. *Tisdale*, 619 P. 2d 608 (1980), *appealed*, 673 P. 2d 836 (1983) 11

Toulouse v. *New York Life Insurance Co.*, 235 P. 2d 1003 (Wash. 1951) 13

Young v. *Katz*, 447 F.2d 431 (5th Cir. 1971) 9

Page

Other Authorities:

28 U.S.C. Section 1254(1) 2

Rule 23, *Federal Rules of Civil Procedure* 2, 3, 14

SEC Rule 13e-3, 17 CFR § 240 13e-3..... 3, 5

2 H. Newberg, *Class Actions* §§ 2830, 1.07 .....9, 10

9 *Moore's Federal Practice* ¶ 203.04 8

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

No. 85-_____

FRANCES ARMSTRONG, *et al.*

Petitioners,

vs.

W. BRUCE THOMAS, *et al.*

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioners, Frances Armstrong, Emma Webber and John Fedor, Jr., on behalf of themselves and similarly-situated former shareholders of the Marathon Oil Company, respectfully pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the Sixth Circuit entered on November 1, 1985, denying a rehearing of the judgment of September 26, 1985.

OPINIONS BELOW

On September 13, 1985, the Sixth Circuit Court of Appeals rendered its decision and opinion in *Radol, et al.* v. *Thomas, et al.*, 772 F.2d 244 (6th Cir. 1985), the class action brought by the named class Marathon plaintiffs (hereinafter "Radol plaintiffs" or "named class plaintiffs"). Prior to issuing this

decision, a panel of the Sixth Circuit entertained oral argument on the matter, including argument from the parties to this petition (hereinafter the "Armstrong plaintiffs" or "petitioners") who had sought to appear on behalf of the class to argue certain issues on appeal which the named class plaintiffs had abandoned. This proceeding was tape recorded, and a partial transcript of the recording appears as Appendix A. (The Notices of Appeal filed by petitioners which brought them before the Sixth Circuit appear as Appendices B and C.) During argument, the Sixth Circuit panel announced its decision to dismiss the Armstrong plaintiffs; however this decision was not journalized until September 26, 1985, and appears as Appendix D. The Armstrong plaintiffs requested rehearing of the dismissal from the Sixth Circuit *en banc*, which was denied by Order of November 1, 1985, and appears as Appendix E.

JURISDICTION

The final judgment of the Sixth Circuit Court of Appeals was dated and entered on November 1, 1985. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

No statutes as such are involved. However the proper interpretation and application of Rule 23 of the Federal Rules of Civil Procedure is at the heart of this case, and a portion of said Rule is set forth as Appendix F.

STATEMENT OF THE CASE

This action is a consolidation of numerous class action claims originally brought separately by various former shareholders of the Marathon Oil Company, which was the target of a two-tier takeover by the United States Steel Corporation in 1982. Prior to trial, the United States District Court for the Southern District of Ohio, Judge Rubin presiding, granted summary judgment dismissing certain claims alleged by the Radol named class plaintiffs, most notably a claim under SEC Rule 13e-3, 17 CFR § 240.13e-3, which alleged that the defendants failed to disclose certain material facts concerning the second-tier merger aspect of the takeover. Consequently, the only issues tried on the merits to the jury focused on the first-tier tender offer, to the exclusion of any consideration of the legality of the merger as a distinct transaction. At trial the respondents prevailed on all counts.

As part of the proceedings, three former Marathon shareholders (the above identified "Armstrong plaintiffs" or "petitioners") filed a separate Notice of Appearance with the trial court pursuant to Rule 23c(2)(C) of the Federal Rules of Civil Procedure and subsequently filed a Notice of Appeal as party plaintiffs with respect to the rulings of the trial court dismissing plaintiffs' claims. Appendix at 6a. They also moved to intervene at the trial level for the purpose of prosecuting an appeal. The trial court denied the Motion to Intervene, and from that decision the Armstrong plaintiffs filed a second Notice of Appeal with respect to that ruling. Appendix at 8a. The purpose of the Armstrong plaintiffs' appeals (consolidated by the Sixth Circuit Court of Appeals into one) was to bring before the reviewing court the claims which examined the validity of the second part of the takeover, the merger — claims which the trial court dismissed through summary judgment. By Order of April 19, 1984, the Sixth Circuit directed all parties to the various appeals (consolidated by the court)[1] to brief the procedural and substantive issues.

[1] Thus, the Sixth Circuit actually consolidated four separate appeals: one from the Radol named-class plaintiffs; two from the Armstrong plaintiffs;

On November 3, 1983, the Radol plaintiffs filed their appellate brief on the merits. Although they had noted the merger claims in their Statement of the Issues filed with the court pursuant to their Notice of Appeal, they did not raise for review any of these issues in their brief on the merits. Petitioners thereafter filed their brief on the merits, which examined extensively the Rule 13e-3 and other merger claims, all of which the named class plaintiffs had failed to bring before the court of appeals and which would have been otherwise lost.

On January 22, 1985, a panel of the Sixth Circuit entertained oral argument, including a brief dialogue with counsel on the procedural propriety of the Armstrong plaintiffs' appellate appearance. *See generally* Appendix at 1a-5a. At the close of this argument, the court announced from the bench that it would grant the respondents' Motion to Dismiss the petitioners' two consolidated appeals, and it further ruled that it had no power to grant appellate intervention on a discretionary basis. Appendix at 3a-5a. These decisions precluded any substantive disposition of the issues surrounding the merger.

On September 13, 1985, the Sixth Circuit Court of Appeals rendered its decision on the merits, affirming in whole the district court. That opinion did not address the substantive issues raised by the Armstrong plaintiffs, as such were not raised or addressed by the representative class plaintiffs in their briefs. The Armstrong plaintiffs therefore petitioned the Sixth Circuit for a rehearing *en banc* of their dismissal from the appeal in order to preserve the crucial issues arising from the second-tier merger, even though the Sixth Circuit panel's oral dismissal had not been journalized.

By Order dated September 26, 1985, the Sixth Circuit officially dismissed the Armstrong plaintiffs from the case. Appendix at 10a. Petitioners renewed their request for rehearing

---

and one from plaintiff Tjarks, a class member who had individually filed a separate notice of appeal.

en banc. The court thereafter denied petitioners' request for rehearing *en banc* by Order of November 1, 1985. Appendix at 11a.

The brief on the merits submitted by the Armstrong plaintiffs to the Sixth Circuit Court of Appeals dealt with issues relating to the merger — issues which are vital to the class plaintiffs' position but which the Radol plaintiffs abandoned on appeal. For instance, the Armstrong plaintiffs demonstrated how respondents violated Rule 13e-3 of the Securities and Exchange Commission, 17 CFR § 240.13e-3, by failing to state in the proxy statement that the merger price was fair. Instead they emphasized the blended price of $106, which included both the tender offer price and the merger cash-out price. Since this was a two-tiered transaction, the prices were separate. The front-end tender offer paid $125 per share and the back end cash out merger offered only securities worth $76 per share of Marathon stock. The proxy statement related only to approval of the merger, since the tender offer had been completed. The Armstrong plaintiffs argued that Rule 13e-3 required a statement as to the fairness of the cash-out price and a detailed discussion as to all factors relating to this price, but that this requirement was not met where the opinion and the discussion related to a different, hypothetical price derived by blending together two distinct transactions. The need for complete discussion of the fairness of the $76 back-end price was especially important in light of the fact that Marathon had previously stated publicly that a competing tender offer of $85 for all shares of Marathon was grossly inadequate.

In its opinion of September 13, 1985, the Sixth Circuit implicitly acknowledged the validity of these arguments in that it clearly held that the tender offer and cash-out merger were separate and distinct transactions. *Radol* v. *Thomas*, 772 F.2d 244, 254 (6th Cir. 1985). The appellate court also recognized the extensive disclosure requirements of Rule 13e-3 and the practical necessities for the extra degree of disclosure:

> The more extensive legal disclosure requirements which apply to freeze-out merger proxy statements are therefore justified by the fact that the law has given the majority the power to foreclose the ownership rights of the minority and has thereby eliminated the market as a correcting mechanism, leaving minority shareholders with only the option of dissent and appraisal, an option which cannot rationally be exercised unless the majority is compelled to make full disclosure regarding appraisals, earnings projections and other information that sheds a light on the value of the firm.

Id. at 255. Despite this clear recognition of the vital importance of the disclosure rules for the second tier of two-tiered acquisitions, the Sixth Circuit failed to consider whether these requirements were satisfied in the Steel-Marathon takeover, because the named class plaintiffs abandoned these issues on appeal and the Sixth Circuit refused to consider the Armstrong plaintiffs' substantive arguments.

The named class plaintiffs have focused on disclosure requirements at the time of the $125 per share cash tender offer, when Marathon disclosed no estimate of the value of its oil and gas reserves and other assets. The Armstrong plaintiffs, by contrast, pointed to, among other things, the asset disclosure made at the time of the $76 per share merger offer, contending that it falsely informed shareholders that the asset value estimated by the First Boston Corporation at $189-226 per share could not be realized. These are entirely separate bases for relief which must both receive substantive consideration for proper representation of the class. If damages were found in this case in the amount of the difference between the merger price and the estimated asset value of $200 per share, the plaintiff class would be entitled to an award totaling approximately 3.5 billion dollars.

The Sixth Circuit panel's sole inquiry as to the petitioners was whether the trial court abused its discretion in denying their Motion to Intervene at the trial level. By limiting its

review of the Armstrong plaintiffs' appeals to a consideration of the trial court's discretion,[2] the Sixth Circuit erroneously failed to acknowledge that petitioners were properly before the appellate court *as of right* pursuant to their Notice of Appeal on the merits, or, alternatively, that it had independent, inherent power to hear the Armstrong claims by granting appellate intervention, regardless of and unrelated to the trial court's determinations.

Petitioners respectfully request this Court to grant a writ of certiorari to review the procedural bases for the Sixth Circuit's granting of the defendants' Motion to Dismiss the Armstrong appeals. The ruling of the Sixth Circuit Court of Appeals is in conflict with the positions of other circuits which do allow class members to appeal adverse rulings and which recognize the discretionary power of a court of appeals to allow appeals by non-parties who are adversely affected by rulings of the trial court. The appellate court's dismissal is a serious departure from the accepted course of judicial proceedings and denies absent class members the right to protect their interests by intervening when appointed class counsel abandon major damage claims on appeal. The issues here present important questions of the administration of class actions and the use of class actions to vindicate important rights created by federal law. Granting of the writ is of fundamental importance as it provides the only possible avenue for a determination by the Sixth Circuit Court of Appeals of all issues relating to the legality of the merger.[3] These are signifi-

---

[2] The Armstrong plaintiffs sought to intervene at the trial level as a non-discretionary matter of right and, alternatively, at the court's discretion. Petitioners do not question the Sixth Circuit's review of the narrow question of trial intervention, nor did they in their Request for Reconsideration *En Banc*.

[3] In separate litigation before Ohio state courts, a number of former Marathon shareholders, representing a small fraction of the shares outstanding at the time of the merger, are seeking a court determined "fair cash value" in lieu of the merger price for those shares. *Armstrong* v. *Marathon Oil Co.*, Case No. 5-84-9 (Ct.App., Hancock County, Ohio, January 14, 1986). While plaintiffs Armstrong and Webber are parties to that case as well,

cant legal questions having important ramifications in the present economic climate of mergers and acquisitions. They are also of paramount importance to the thousands of class members who were once Marathon shareholders.[4]

REASONS FOR GRANT OF WRIT

POINT I

IT WAS A DENIAL OF DUE PROCESS AND AGAINST ESTABLISHED JUDICIAL PROCEDURE FOR THE SIXTH CIRCUIT COURT OF APPEALS TO DISMISS THE ARMSTRONG PLAINTIFFS' APPEAL FROM FINAL JUDGMENT, WHEN THEIR APPEAL WAS AS OF RIGHT PURSUANT TO THEIR FILING OF A NOTICE OF APPEARANCE WITH THE TRIAL COURT AND A TIMELY NOTICE OF APPEAL.

Any party to an action may prosecute an appeal from a final appealable order. 9 *Moore's Federal Practice* ¶ 203.04 *et seq.* (1985) and cases cited therein. All class members are, by definition, parties to a class action, whether technically la-

---

plaintiff Fedor is not and the intervention suit here is on behalf of the entire class of former shareholders represented by the Radols. The eventual state appraisal award could in no event be considered an adequate substitute for intervention in the present case to pursue on behalf of all former Marathon shareholders who have not opted out of the Radol class the serious claims of violation of federal law not appealed by the class representatives.

[4] The named class plaintiffs filed a petition for certiorari with this Court on December 12, 1985, and did not raise the merger issues, as indeed they could not, since they failed to being them properly before the Sixth Circuit Court of Appeals. Petitioners are not requesting this Court to determine the substantive issues relating to the merger but only to rule that they were entitled to present these to the Sixth Circuit Court of Appeals for a ruling on the merits.

beled such or not. 2 Newberg, *Class Actions* § 2830 (1977); §§ 1.07 *et seq.* (2d ed. 1985). *Accord, American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538, 549 (1974). Potential class members may either withdraw or agree to class representation. This Court has stated that thereafter "they are either non-parties to the suit and ineligible to participate in a recovery . . . or else they are full members who must abide by the final judgment. . . ." *Id.* at 549. Accordingly, class members also have standing to appeal from adverse decisions and object to settlements. *See, e.g., Dosier* v. *Miami Valley Broadcasting Corp.*, 656 F.2d 1295 (9th Cir. 1981); *Reynolds* v. *National Football League*, 584 F.2d 280 (8th Cir. 1978); *Patterson* v. *Stovall*, 528 F.2d 108 (7th Cir. 1976); *Young* v. *Katz*, 447 F.2d 431 (5th Cir. 1971).

In this class action, petitioners filed a Notice of Appearance with the trial court and, pursuant to that Notice, filed a timely appeal from the final judgment. Procedurally this was sufficient to perfect their appeal on the merits as of right. *See generally, e.g., Research Corp.* v. *Asgrow Seed Co.*, 425 F.2d 1059 (7th Cir. 1970); *Cohen* v. *Young*, 127 F.2d 721 (6th Cir. 1942).[5]

Petitioners clearly sought to participate in the appeal as was their right in order to preserve on appeal those issues which the named class plaintiffs abandoned on appeal and which had never been heard on the merits due to the trial court's summary dismissal. Nevertheless, the appellate court

---

[5] During oral argument, the Sixth Circuit panel posed the hypothetical possibility that a Notice of Appearance could not give a class member any participatory rights because class action lawsuits would be reduced to mass multiple-plaintiff chaos, and, as such, impossible to litigate. That court's concern over imagined hydra-headed plaintiffs is entirely speculative. This case arose out of one of the biggest takeovers and mergers in the corporate history of the United States, yet only two non-named class plaintiffs (out of a class of roughly 50,000) sought to participate separately. Even this small showing is atypical as most class members are reluctant and unable to assume the great burden of active participation in a class action. As a practical matter, therefore, it was factually insupportable for the appellate court to deny the petitioners' appellate participation on this basis.

incorrectly limited its inquiry to a consideration of whether the petitioners should have been allowed intervention at trial, thereby focusing on whether the representative class plaintiffs adequately represented the class. The question of the adequacy of the Radol plaintiffs' *trial* representation was only germane to the determination of the Armstrong plaintiffs' Motion to Intervene before Judge Rubin and their appeal from his denial of the same. The Armstrong plaintiffs filed two notices of appeal, Appendix at 6a and 8a, and did not contest the Sixth Circuit's affirmance of the denial of intervention at the trial court level, nor do they raise this issue in this Petition. Petitioners submit that they were before the Sixth Circuit as of right and that the question of the propriety of trial intervention was irrelevant.

The courts have a continuing duty to protect the interests of absent class members. Therefore, the federal courts have held that class members have automatic rights of appeal unlike non-class plaintiffs; *e.g.*, members objecting to a proposed settlement have a right to appeal from an approval of that settlement. *E.g.*, *Armstrong* v. *Board of School Directors*, 616 F.2d 305, 327 (7th Cir. 1980); 2 H. Newberg, *Class Actions* § 11.59 (2d ed. 1985). Even where class members have the right to opt out of the class, they are nevertheless able to appeal an order approving a settlement which they deem unsatisfactory. *Ace Heating & Plumbing Co.* v. *Crane Co.*, 453 F.2d 30, 32 (3d Cir. 1971).

Petitioners' appellate standing is analogous to this right of class members to object to an appeal from settlement agreements. In both situations, named class plaintiffs have proceeded in a way that is, in the opinion of the representative class plaintiffs, best for the entire class. Absent class members who feel their interests are not being adequately represented, however, may appeal, and this right exists independently of any procedural prerequisite, *e.g.*, a motion to intervene, trial participation. *Armstrong* v. *Board of School Directors*, 616 F.2d at 327. *Accord*, *Re General Motors Corp. Engine Interchange Litigation*, 594 F.2d 1106, 1121 (7th

Cir.), *cert. denied*, 444 U.S. 870 (1979), *and later appealed*, *Oswald* v. *McGarr*, 620 F.2d 1190 (7th Cir. 1980.)[6]

These contrary rulings from courts of appeal of other circuits demonstrate a conflict among circuits as to this important matter of the rights of class members to appeal adverse rulings.

In this case, petitioners' appeal from the final judgment was procedurally grounded in their Notice of Appearance and timely filed Notice of Appeal. The Sixth Circuit Court of Appeals' granting of the respondents' Motion to Dismiss this appeal was contrary to accepted judicial proceeding. The inequitable effect of the dismissal is to bind petitioners (and all other class members) to the final judgment, which was rendered without the appellate court's consideration of crucial issues which could afford relief. *Cooper* v. *Federal Reserve Bank*, ____ U.S. ____, 104 S.Ct. 2794, 2799 (1984) (a properly entertained class action is binding on all class members). Such a result in this case is unwarranted and erroneously harsh. The Armstrong plaintiffs therefore urge this Court to recognize the legitimacy of the Armstrong plaintiffs' appeal as of right and to remand the cause to the Sixth Circuit for consideration of the substantive issues presented in petitioners' brief on the merits.

---

[6] *See also* analogous state court decisions, *e.g.*, *Piper* v. *Central Louisiana Electric Co.*, 437 So.2d 997, 999 (La. App. 1983) (sole object of appeal is to give aggrieved party recourse to superior tribunal for correction of judgment of inferior court, and such right is extended not only to parties to a suit but also to a third person who is allegedly aggrieved by the judgment).

That one aggrieved by a judgment is entitled to bring an appeal challenging the same is illustrated also in the case recognizing an attorney's right to maintain an appeal concerning the award of attorney's fees to his or her client below. *E.g.*, *Fickle* v. *Adkins*, 385 So. 2d 1141 (Fla. Dist. Ct. App. 1980); *Tisdale* v. *Wheeler Brothers Grain Co.*, 599 P.2d 1104 (Okla. 1979), *later proceeding*, *Abel* v. *Tisdale*, 619 P.2d 608 (1980), *later appealed*, 673 P.2d 836 (1983).

POINT II

EVEN IF PETITIONERS HAD NO APPEAL AS OF RIGHT, IT WAS WITHIN THE INDEPENDENT, INHERENT POWER OF THE SIXTH CIRCUIT TO ALLOW PETITIONERS FULL APPELLATE PARTICIPATION, AND IT WAS THEREFORE A DENIAL OF DUE PROCESS AND AGAINST PROPER JUDICIAL PROCEDURE FOR THE COURT TO REFUSE TO CONSIDER THE APPROPRIATENESS OF PETITIONERS' INTERVENTION AT THE APPELLATE LEVEL FOR PURPOSES OF REVIEWING SUBSTANTIVE ISSUES WHICH THE NAMED CLASS PLAINTIFFS HAD ABANDONED ON APPEAL

Petitioners submit they were properly before the Sixth Circuit Court of Appeals pursuant to their appeal as of right, as discussed in Point I, *supra*. However, even if they were not entitled to an appeal as of right, the Sixth Circuit had independent, inherent power to allow the Armstrong plaintiffs to intervene at the appellate level as full participants.[7] It was not bound by the trial court's decision denying intervention below nor were the governing considerations the same.

Federal appellate courts unquestionably have independent, inherent power to allow appellate participation where none was given (or in some cases even sought) in the trial court. Thus, in *Overby* v. *United States Fidelity & Guaranty Co.*, 224 F.2d 158, 162 (5th Cir. 1955), a non-party adversely affected by a trial court's ruling concerning property in his

---

[7] In remarks from the bench on January 22, 1985, the panel erroneously stated that it had no independent discretion to allow petitioners' appellate appearance. Appendix at 3a. The court further implied that it could not independently consider intervention because no formal motion had been filed at the appellate level. *Id.* This is not a prerequisite, *Adams* v. *Morton*, 581 F.2d 1314 (9th Cir. 1978), *cert. denied*, 440 U.S. 958 (1979); moreover the Sixth Circuit effectively waived the need for any formal request when it directed counsel for all parties, petitioners specifically included, to brief and argue the substantive issues, which they did.

possession was allowed to appeal that order. In that case, the court stated unequivocally that the non-party appellant had "standing to maintain this appeal whether or not he was formally recognized as a party to the suit in the district court." Likewise, in *McKenna* v. *Pan American Petroleum Corp.*, 303 F.2d 778, 779 (5th Cir. 1962) appellate intervention was recognized although the court cautioned, "A court of appeals may, but only in an exceptional case for imperative reasons, permit intervention where none was sought in the district court." *See also*, *Preston* v. *United States*, 284 F.2d 514 (9th Cir. 1960); *Holland* v. *Board of Public Instruction of Palm Beach County, Florida*, 258 F.2d 730 (5th Cir. 1958).

The clear recognition by these courts of the power to allow such intervention demonstrates a conflict among circuit courts of appeal as to this question.

State appellate courts likewise have the same independent discretion to allow appellate intervention where there was no participation in the trial below. *See generally*, *Toulouse* v. *New York Life Insurance Co.*, 235 P.2d 1003 (Wash. 1951); *Re Roth's Estate*, 52 A.2d 811 (N.J. 1947); *McCullough* v. *Scott*, 109 S.E. 789 (N.C. 1921); *Mires* v. *Hogan*, 192 P.811 (Okla. 1920). As in the federal system, to prosecute an appeal as a non-party one must be a person "substantially aggrieved" by a lower court's judgment. *E.g.*, *Kornfield* v. *Perl Mack Liquors, Inc.*, 567 P.2d 383 (Colo. 1977); *Re Tomlinson's Estate*, 359 N.E. 2d 109 (Ill. 1976) (interests that will justify an appeal by one not a party below must be direct, immediate, and substantial; such interests must be interests which would be prejudiced by the judgment or benefit from its reversal).

Auerbach v. *Bennett*, 408 N.Y.S. 2d 83 (1978), *modified*, 419 N.Y.S. 2d 920 (1979) presents a case strikingly similar to the present one. There a representative plaintiff in a derivative suit chose not to appeal the grant of summary judgment for the defendants. Another shareholder, who had filed a separate but similar action, filed a notice of appeal and was permitted to argue the merits on appeal. The court expressly

recognized that "the power exists in the court to grant intervention whenever the circumstances justify such exercise of discretion." *Id.* at 86.

The criteria for allowing appellate intervention is whether the person seeking appellate review has been adversely affected by the judgment below. Petitioners fell squarely within this requirement; moreover, they were parties to the trial proceeding. The proper question for the Sixth Circuit, therefore, was whether the Radol plaintiffs properly represented the class *on appeal*. Clearly where, as here, representative class plaintiffs fail to appeal as error several key claims which could provide relief for the class, then the representative class members have abandoned those claims and failed to represent the class adequately *at the appellate level*. Rule 23(a)(4) of the Federal Rules of Civil Procedure requires that the class representative "fairly and adequately protect the interests of the class." This requirement anticipates a "vigorous prosecution." *See, e.g., Senter* v. *General Motors Corp.* 532 F. 2d 511 (6th Cir.), *cert. denied*, 429 U.S. 870 (1976); *see also, Jordan* v. *Global Natural Resources, Inc.*, 102 F.R.D. 45 (S.D. Ohio 1984); *Stoller* v. *Baldwin United Corp.*, Fed. Sec. L. Rep. (CCH) ¶ 91, 678 (September 19, 1984). Abandoning important issues on appeal, for no discernible reason, is not within the literal requirements or the spirit of Rule 23.

Unlike the cases cited above, the Sixth Circuit did not make a discretionary decision, but rather held that it lacked any power to exercise its discretion. Petitioners ask this court not to review the abuse of its discretion but rather to review the ruling that the court lacked the discretionary power to allow intervention at the appellate stage of the proceedings.

CONCLUSION

Petitioners have sought relief in this Court so that significant arguments to the class claim will be heard. Petitioners therefore respectfully pray the Court grant a writ of certiorari to review the decision of the Sixth Circuit Court of Appeals granting the respondents' Motion to Dismiss petitioners' appellate participation.

Petitioners have preserved claims not within the scope of the Sixth Circuit's decision on the merits which could provide substantial relief to the class but which will be forever lost if petitioners are not allowed to be heard. The representative class plaintiffs' abandonment of the claims mandates this result. To deny petitioners appellate participation is a denial of due process and against proper judicial procedure.

The writ should issue.

Respectfully submitted,

DOUGLAS G. COLE, Esquire
STRAUSS, TROY AND
RUEHLMANN CO., L.P.A.
2100 Central Trust Center
201 East Fifth Street
Cincinnati, Ohio 45202
(513) 621-2120

MARVIN KARP, Esquire
ULMER, BERNE, LARONGE,
GLICKMAN & CURTIS
900 Bond Court Building
Cleveland, Ohio 44114
(216) 621-8400

Attorneys for Petitioners

January 29, 1986

CERTIFICATE OF SERVICE

I, Douglas G. Cole, hereby certify that I am a member of the Bar of the Court, that I am one of the attorneys for petitioners on the foregoing Petition, and that three copies of the foregoing Petition were served on all counsel of record to the proceedings below by United States mail this date by deposit of same in a United States post office or mail box, First Class postage prepaid, addressed to counsel of record at their respective office addresses.

DATED: January 29, 1986

/s/ _____
DOUGLAS G. COLE

APPENDIX A

Partial Transcript of Oral Argument Before A Panel of the United States Court of Appeals, Sixth Circuit, on January 22, 1985

SPEAKER D: I am here today on behalf of appellants intervenor-appellants, Armstrong, et al. We were prepared for a short argument, as a matter of fact we were prepared for three minutes vs. five.

SPEAKER A: Well, we'll give you the five minutes.

SPEAKER D: So the two minutes is somewhat of a gift. And I think what is most important to address in the outset.

SPEAKER A: Well, you better address the motion at least for me, because I don't quite understand how you're here legitimately.

SPEAKER D: The way we first got here occurred during the course of the trial. The court probably knows we as a law firm, k ɔw that out client was ready to participate as party plaintiff counsel in the trial. But our clients welcome members of the committee (INAUDIBLE) Marathon shareholders (INAUDIBLE) committee and members of that committee span all types of different shareholders relative to the merger, those who (INAUDIBLE) merger, (INAUDIBLE) appraisal remedy, and the state court, plus those who did not, therefore, whatever recovery they would have would come as members of the class. The hired counsel who monitored the trial, and as they monitored the trial, it became apparent to them that there were some very important issues that could establish liability, that were not being presented and not being preserved so that they could be presented to the jury. Foremost amongst these was the question involving the adequacy of disclosure in the proxy statement as to the actual value of these net assets which Mr. (INAUDIBLE) referred to. Specifically, there is a statement in the proxy statement. . .

SPEAKER A: Well how is that different from what he's arguing here? You mean there are other things. . .

SPEAKER D: Well, there are other points. I'm trying to give a little background. The way they first got involved in the case was by urging past representative counsel to seek to amend a complaint to add a claim saying that the proxy statement contained an affirmative misrepresentation when it stated that the bottom line asset value of Marathon was reflected both in the First Boston Report and the Strong Reports were not indicative of the possible liquidation values. Prior to that, Judge Rubin, by means of a summary judgment, had ruled out any claim that related solely to the degree or type of adequacy of disclosure in the proxy statement. Therefore, our client is in the position of seeking to add claim (INAUDIBLE) the trial, is basically (INAUDIBLE) . . . the evidence that would (INAUDIBLE) to the legality of that proxy statement. Judge Rubin first ruled it in, and then later reversed himself and ruled it out. At that point, in order to assure that that particular point and other points relating more specifically to the merger as a separate and distinct transaction, to assure that these points were adequately addressed, adequately briefed and adequately presented to this court, we sought to intervene.

SPEAKER A: That was after the judgment went down, or after the verdict and all, right?

SPEAKER D: That's correct, but the Supreme Court case, I believe the Transworld Airlines, has indicated that a motion to intervene is timely and proper as long as it is made during the time during which an appeal can be taken, so I don't think that we can be faulted for that.

SPEAKER A: Well, now, he overruled your motion to intervene. And the question before us then on appeal, is whether he abused his discretion in denying your right to intervene and I guess his basic point was you've got about, . . . Mr. Weiss and his Plaintiffs are representing you adequately, and you don't have a big problem there and why is he wrong about that?

SPEAKER D: Well, there are three issues basically. There's the issue of discretionary intervention, an issue of mandatory

intervention, and there's an issue that goes directly to this court's discretion as to whether or not they want us to be part of this proceeding. Why is the judge wrong? Because first of all, in the issue that I just mentioned, with respect to the amendment to conform to the evidence relating to the statement in the proxy, that was given very cursory attention by class representatives. We believe the class representatives did an outstanding job presenting the issues that they saw important, but I think in order to protect the interest of all the class members and other shareholders of Marathon that can be affected by the (INAUDIBLE) of this case, there are other issues equally important which haven't achieved the same degree of attention, and we think that we should be in here so that they do.

SPEAKER C: You're saying that you're entitled to intervene because you want to emphasize a different issue than the Defendant's counsel.

SPEAKER D: That's correct.

SPEAKER C: Well, that way, we could have everybody in the class intervening because each of them thinks one issue is more important and have 50 lawyers up here on every appeal.

SPEAKER D: Well, I think that's one of the reasons why this rule is discretionary, and I think in order for this court to exercise its discretion . . .

SPEAKER C: You didn't ask to intervene in this court. You're appealing the District Court's judgment. So it's not a matter of our discretion.

SPEAKER D: I believe it's a matter of either the discretion of the trial court or the discretion of this court, and . . .

SPEAKER C: Why do we have discretion?

SPEAKER D: I think this court has inherent discretion to allow any party to appear before (INAUDIBLE) . . . The point I want to make is that I think the court has to look at the nature of the issues that we're presenting. Whether these issues are important or significant and should be a part of this court's decision-making in this case. And I think any comparison to the brief will indicate especially with regard to

legality of the merger, not only with respect to the statement in the proxy statement, but also the Rule 13e3, the questions of state fiduciary duty, the questions of fairness, the questions of legality of the squeeze-out merger, that if we're not allowed to appear at these proceedings, than these issues are going to be lost forever, and some very important rights that the shareholders at Marathon may have had may be lost forever. The other point I would make is that we didn't know until the briefs were filed in the appeal, what points would be urged on appeal, and we believe that there are some very significant points relating to the degree of protection to the minority shareholders that were presented in the trial court by Plaintiff's counsel that were ruled out of this case by means of summary judgment that were improperly ruled out and are only going to be presented and ruled upon by this court if we're allowed to proceed with this appeal. That's not something we ever could have known during the course of proceedings in the trial court.

SPEAKER A: Anything else you'd like to say to Mr. Jacobs, on the question of the motion to dismiss your appeal because you lack standing to pursue the appeal. In other words, because you are not a party in the court below. Anything else you'd like to say to us on that?

SPEAKER D: No, I think the only thing I would add is that the court has to look at the nature of the issues that we're raising and the importance of this case. I think that is the ultimate test, and if nothing else, as a last point, I think the issues are so important that, at the very minimum, we should be allowed to receive (INAUDIBLE).

SPEAKER A: Counsel, the court is prepared to rule on the motion and understand your zeal in pursuing your client's interest, and because of the importance of the case as you see it, the reason you would like to be here. But the court is going to grant the motion to dismiss your appeal, and the reason for that is that the Federal Rules of Civil Procedure present a structure in which these class action cases are to be tried and managed. They are necessarily difficult to manage under any circumstance, and to permit the class members to come in in-

dividually after the case has been tried and pursue points on appeal, is not, we just can't contain and manage these actions and there is no precedent for that. The Federal Rules of Civil Procedure don't require that. It's true that the court below could have granted your petition to intervene, but it did not, and we certainly can't say that Judge Rubin on that point, abused his discretion, and so, the motion filed by the Defendant Appellees to dismiss your appeal because you were not a party in the court below, is granted. Now, Mr. Tjarks, you've got a similar problem, so you better tell us why you're different from Mr. Armstrong.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C-1-82-13

IRVING and CHARLOTTE RADOL, et al.
Plaintiffs,

v.

W. BRUCE THOMAS, et al.
Defendants.

NOTICE OF APPEAL

(Filed August 29, 1983)

Notice is hereby given that Frances Armstrong, Emma Webber and John Fedor, Jr., having entered an appearance pursuant to Fed. R. Civ. P. 23(C)(2)(C) and having moved to intervene pursuant to Fed. R. Civ. P. 24, hereby appeal to the United States Court of Appeals for the Sixth Circuit from the judgment entered in these actions.

Said judgment was entered on the 30th day of June, 1983. The plaintiffs' motions for new trial were overruled by order entered the 28th day of July, 1983.

STRAUSS, TROY AND
RUEHLMANN CO., L.P.A.
/s/ DOUGLAS G. COLE

2100 Central Trust Center
Cincinnati, Ohio 45202
(513) 621-2121

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Notice of Appeal was served by ordinary United States mail, first class postage prepaid, on all counsel of record this 29th day of August, 1983.

STRAUSS, TROY AND
RUEHLMANN CO., L.P.A.
/s/ DOUGLAS G. COLE

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C-1-82-13

IRVING and CHARLOTTE RADOL, et al.
Plaintiffs,

v.

W. BRUCE THOMAS, et al.
Defendants.

NOTICE OF APPEAL

(Filed September 19, 1983)

Notice is hereby given that Frances Armstrong, Emma Webber and John Fedor, Jr. hereby appeal to the United States Court of Appeals for the Sixth Circuit from the final Order denying the application of Frances Armstrong, Emma Webber and John Fedor, Jr. to intervene in this action, said final Order having been entered on the 6th day of September, 1983, by Chief Judge Carl B. Rubin in the District Court for the Southern District of Ohio.

STRAUSS, TROY AND
RUEHLMANN CO., L.P.A.
/s/ DOUGLAS G. COLE

2100 Central Trust Center
Cincinnati, Ohio 45202
(513) 621-2120

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Notice of Appeal was served by ordinary United States mail, first class postage prepaid, on all counsel of record this 19th day of September, 1983.

/s/ DOUGLAS G. COLE

APPENDIX D

IRVING RADOL, ET AL.,
Plaintiffs,

ALFRED V. TJARKS,
Plaintiff-Appellant,
(No. 83-3643)

FRANCES ARMSTRONG, EMMA WEBER,
JOHN FEDOR, JR.,
Plaintiffs-Appellants
(No. 83-3644 and 83-3670)

v.

W. BRUCE THOMAS, ET AL.
Defendants-Appellees.

ORDER

(Filed September 26, 1985)

BEFORE: MERRITT and KENNEDY, Circuit Judges, and PECK, Senior Circuit Judge

Upon consideration of the motions filed by the appellees in each of the above-captioned cases to dismiss the appeals; and

Further considering the responses of the respective appellants opposing those motions;

The court finds the motions to be well taken; it is therefore

ORDERED that each of these be, and they hereby are, dismissed.

ENTERED BY ORDER OF
THE COURT
JOHN P. HEHMAN, Clerk
By: LENOARD GREEN
Chief Deputy Clerk

APPENDIX E

No. 83-3644/3670

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IRVING RADOL, ET AL.,
Plaintiffs-Appellants,

v.

W. BRUCE THOMAS, ET AL.,
Defendants-Appellees.

ORDER

(Filed November 1, 1985)

BEFORE: MERRITT and KENNEDY, Circuit Judges, and PECK, Senior Circuit Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF
THE COURT
/s/ JOHN P. HEHMAN, Clerk

APPENDIX F

Excerpt from Rule 23 of the Federal Rules of Civil Procedure

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

. . . (2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

No. 85-1390

(2)

Supreme Court, U.S.
FILED
FEB 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1985

FRANCES ARMSTRONG, EMMA WEBBER and JOHN FEDOR, JR.,

Petitioners,

v.

W. BRUCE THOMAS, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

HALIBURTON FALES, 2d*
RICHARD J. HOLWELL
THOMAS McGANNEY
RICHARD W. REINTHALER
DWIGHT A. HEALY

WHITE & CASE
1155 Avenue of the Americas
New York, New York 10036
(212) 819-8200

JOHN W. BEATTY
DINSMORE & SHOHL
2100 Fountain Square Plaza
Cincinnati, Ohio 45202
(513) 621-6747

Attorneys for Respondents: United States Steel Corporation, et al.

ERWIN N. GRISWOLD
JOHN L. STRAUCH*
JOHN M. NEWMAN, JR.
ROBERT R. WELLER
JOHN W. EDWARDS II
JAMES R. JOHNSON

JONES, DAY, REAVIS & POGUE
1700 Huntington Building
Cleveland, Ohio 44115
(216) 348-3939

Attorneys for Respondents: Marathon Oil Company, et al.

* *Counsel of Record.*

Counterstatement of the Questions Presented for Review

1. Do unnamed class members who had neither intervened nor in any way participated in the pretrial or trial of a class action have an automatic right to appeal and to raise on appeal issues which the class representatives were themselves pursuing on appeal as well as issues which had not been raised or addressed below?

2. Are petitioners entitled to have this Court determine whether the Court of Appeals had the discretion to permit petitioners to intervene at the appellate level when petitioners never requested leave to do so and the Court of Appeals never decided the issue?

Statement of the Parties to This Proceeding

Respondent Marathon Oil Company is now a wholly-owned subsidiary of Respondent United States Steel Corporation, and portions of its business are operated as separate, wholly-owned subsidiaries of United States Steel Corporation. In addition to its wholly-owned subsidiaries, Marathon Oil Company is affiliated with the following entities:

Arctic LNG Transportation Company
Badger Pipe Line Company
City Point Oil Terminal, Inc.
CLAM Petroleum Company
Cook Inlet Pipe Line Company
Deutsche Transalpine Olleitung GmbH
Explorer Pipeline Company
Gravcap, Inc.
Green Bay Terminal Corporation
Kenai LNG Corporation
LOCAP, Inc.
LOOP Inc.
Oasis Oil Company of Libya, Inc.
Oil Insurance Limited
Petroleum Terminals, Inc.
Pilot Oil Corporation
Platte Pipe Line Company
Polar LNG Shipping Corporation
Russell Stewart Oil Co.
Societa Italiana Per L'Oleodotto Transalpino, S.p.A.
Transalpine Finance Holdings S.A.
Transalpine Olleitung in Osterreich GmbH
West Shore Pipe Line Company
Wolverine Pipe Line Company

In addition to subsidiaries which are wholly-owned, including Marathon, Respondent United States Steel Corporation is affiliated with the following entities:

Athlone Prospecting & Development Corporation, Ltd.
First National Bank (Albion, Pa.)

Companhia Meridional de Mineracao
Brazaco-Mapri Industries Metalurgicas S.A.
ITW-Mapri (51% owned by Brazaco-Mapri)
Mecania Walsywa, Ltda.
Companhia Siderurgica Paulista "Cosipa"
Merinds Mineracao
Mineracao Buritirama Ltda.
Mineracao Carajas, Ltda.
Mineracao Maraba, Ltda.
Mineracao Xingu, Ltda.
Termerid Mineracao, SA
Torremco Soc. Min. E. Com. Ltda.
Deepsea Ventures, Inc.
Ocean Mining Associates
FHS Stahlverformung GmbH
FHS Automotive Parts Manufacturing Ltd.
Industria de Tubos y Perfiles, S.A. (Intuperas)
Minerales Ordaz C.A.
Les Entreprises du Lac Lucault Inc.
Sidbec-Normines, Inc.
U.S. Steel France
Zaerust Chrome Mines, Limited
Northern Tier Pipeline Co.
USS MaxTech Company, Inc.
USS MaxTech Company, Ltd.
USS Max Tex Company (Japan), Ltd.
USS Technology (Japan), Ltd.
ACE Holdings, Ltd.
Adela Investment Company, S.A.
Altos Hornos de Viscaya, S.A. (AHV)
Associated Ore & Metal Corporation, Ltd.
Avsteel SWA, Ltd.
Blue Grass Phosphate Company
Chrome Deposit Corp. (Court Holdings J.V.)
Jupiter Mining and Prospecting Co. (Pty.) Ltd.
Kappa Mining & Prospecting Co., Ltd.
La Pointe Iron Company
Navios Corporation

Navios Ship Management Services, Inc.
Oresteel Investments (Proprietary), Ltd.
P.T. Pacific Wikkel Indonesia
Sigma Mining & Prospecting Co. (Pty.) Ltd.
Societe Des Mines De Fer De Guinea Pour L'Exploitation Des Monts Nimba (Mifergui Nimba)
Tilden Iron Mining Company
West Union Canal Company, The
Bartow Chemical Products
Century III Associates
Fort Meade Chemical Products
Double Eagle Steel Coating Co.
Live Oak Uranium Operations
Rockland Joint Venture
RMI Company
Tenneco/USS Chemicals Joint Venture
Compagnie Miniere de l'Ogooue (Comilog)
Feralloys, Ltd.
Assoc. Manganese Mines of South Africa, Ltd.
Navios Shipholding, Inc.
Prieska Cooper Mines (Pty.) Ltd.
Terninoss Acciai Inossidabili–S.p.A.
Zuari Argo Chemicals Ltd.

TABLE OF CONTENTS

	PAGE
Counterstatement of the Questions Presented for Review	I
Statement of the Parties to This Proceeding	II
Table of Authorities	VI
Opinions Below	1
Statutes and Regulations Involved	2
I. Statement	2
II. Summary of Argument	9
III. Reasons for Denying the Writ	10
A. Petitioners Had No Right To Appeal The District Court's Judgment, And The Court Of Appeals Did Not Violate Constitutional Or Procedural Requirements In Dismissing That Appeal As Improper	10
B. Petitioners Failed To Request Permission From The Court Of Appeals To Intervene In The Appeal And Did Not Offer Any Grounds That Would Have Supported Intervention	18
IV. Conclusion	23

TABLE OF AUTHORITIES

PAGE

Cases:

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) 19
American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974) 10, 16, 17

Bumgarner v. Ute Indian Tribe of Uintah & Ouray Reservation, 417 F.2d 1305 (10th Cir 1969) 21

Delaware Valley Citizens' Council v. Commonwealth of Pennsylvania, 674 F.2d 970 (3d Cir. 1982) 12

Gustave v. United States, 627 F.2d 901 (9th Cir. 1980) 21
Guy v. Robbins & Myers, Inc., 525 F.2d 124 (6th Cir. 1979), *rev'd on other grounds sub nom.* International Union of Electrical Radio & Machine Workers v. Robbins & Myers, Inc., 429 U.S. 229 (1976) 20

Holland v. Board of Public Instruction, 258 F.2d 730 (5th Cir. 1958) 19

In re Air Crash Disaster, 549 F.2d 1006 (5th Cir. 1977) 14

Kosak v. United States, 465 U.S. 848 (1984) 19

McKenna v. Pan American Petroleum Corp., 303 F.2d 778 (5th Cir. 1962) 19

NAACP v. New York, 413 U.S. 345 (1973) 12

Overby v. United States Fidelity & Guaranty Co., 224 F.2d 158 (5th Cir. 1955) 19

Preston v. United States, 284 F.2d 514 (9th Cir. 1960) 19

Radol v. Thomas, 772 F.2d 244 (6th Cir. 1985) 1, 2
Ramsey v. Arata, 406 F. Supp. 435 (N.D. Tex. 1975) 11

PAGE

Research Corp. v. Asgrow Seed Co., 425 F.2d 1059 (7th Cir. 1970) 14
Robinson v. Union Carbide Corp., 544 F.2d 1258 (5th Cir.), *cert. denied*, 434 U.S. 822 (1977) 16
Rodgers v. Lodge, 458 U.S. 613, *reh'g denied*, 459 U.S. 899 (1982) 19

Stadin v. Union Electric Co., 309 F.2d 912 (8th Cir. 1962), *cert. denied*, 373 U.S. 915 (1963) 12, 21

Trbovich v. United Mine Workers, 404 U.S. 528 (1972) 12

United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977) 12
United States v. Associated Milk Producers, Inc., 534 F.2d 113 (8th Cir.), *cert. denied*, 429 U.S. 940 (1976) 12

Statutes:

28 U.S.C. § 1404 14
Securities Exchange Act of 1934 § 14(a), 15 U.S.C. § 78n(a) 4

Rules:

Fed. R. Civ. P. 23 ..... 10, 15, 22
Fed. R. Civ. P. 23(a) 10
Fed. R. Civ. P. 23(a)(4) 13
Fed. R. Civ. P. 23(b)(3) 14, 15
Fed. R. Civ. P. 23(c)(2)(A) 15
Fed. R. Civ. P. 23(c)(2)(C) 10, 11, 12
Fed. R. Civ. P. 23(d) 14
Fed. R. Civ. P. 23(e) 13, 14
Fed. R. Civ. P. 24 ..... 11, 22
Fed. R. Civ. P. 24(a) 12

PAGE

Fed. R. Civ. P.42(a) 14
Fed. R. Civ. P. 23 Advisory Committee Note, 39 F.R.D. 69 (1966) 17
SEC Rule 13e-3, 17 C.F.R. § 240.13e-3 3, 20
Rules of the Supreme Court of the United States, Rule 17 9

Other Authorities:

Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure(1)*, 81 Harv. L. Rev. 356 (1967) 11

9 J. Moore, B. Ward & J. Lucas, *Moore's Federal Practice* ¶ 210.04[1] (2d ed. 1985) 20

Newberg, *Orders in The Conduct of Class Actions: A Consideration of Subdivision (d)*, 10 B.C. Indus. & Com. L. Rev. 577 (1969) 16

1 Newberg, *Class Actions* §§ 1.07 et seq. (2d ed. 1985) 10

4 Newberg, *Class Actions* § 22.64 (2d ed. 1985) 11

16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* § 3956 (1977 & Supp. 1985) 20

IN THE

Supreme Court of the United States

October Term, 1985

No. 85-1390

FRANCES ARMSTRONG, EMMA WEBBER and JOHN FEDOR, JR.,
Petitioners,

v.

W. BRUCE THOMAS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

Opinions Below

The opinion of the Court of Appeals for the Sixth Circuit in the principal action, *Radol, et al.* v. *Thomas, et al.*, is reported at 772 F.2d 244. The decision of the Court of Appeals dismissing the appeals of the petitioners (referred to herein as the "Armstrong Group") was announced at oral argument on January 22, 1985. That decision was embodied in an order dated September 26, 1985. The Armstrong Group's request for rehearing *en banc* of the dismissal was denied in an order dated November 1, 1985.

Copies of these orders, together with an incomplete transcript of a tape recording (some of which is unintelligible and not transcribed) of the oral argument before the Court of Appeals are attached to the petition.

Statutes and Regulations Involved

The following Federal Rules of Civil Procedure are cited in the brief and reproduced in the Appendix:

Rule 23 ..... A1
Rule 24 ..... A4

I.

Statement

The petition requests this Court to review the dismissal, by a unanimous panel of the Court of Appeals for the Sixth Circuit, of petitioners' attempted appeal from the judgment entered in *Radol, et al.* v. *Thomas, et al.* (and 12 other consolidated class actions), which challenged, under both federal and state law, the acquisition of Marathon Oil Company ("Marathon") by United States Steel Corporation ("U.S. Steel"). That action ended in a judgment, after a jury trial, in favor of defendants on all issues and was unanimously affirmed on appeal. 772 F.2d 244 (6th Cir. 1985). A petition for a writ of certiorari has been filed by the class representatives and is pending before the Court (No. 85-1030).

Petitioners are former shareholders of Marathon and are unnamed members of the *Radol* class. They were also members of the so-called Marathon Shareholders' Committee which actively (and unsuccessfully) sought to defeat

the merger of Marathon into U.S. Steel through a proxy solicitation campaign. When their efforts proved unsuccessful, they elected not to sue for damages but rather to pursue another remedy by seeking a judicial appraisal of their shares under Ohio law.

The *Radol* actions were commenced in various districts in January, 1981. The 13 actions were transferred and consolidated in the Southern District of Ohio. The District Court certified a class, appointed a lead counsel committee consisting of four of the plaintiffs' law firms in the consolidated actions, and directed the filing of a consolidated complaint. In their 42 page consolidated amended complaint (the "Complaint"), the class representatives and lead counsel committee asserted a variety of federal securities law and state law claims challenging, *inter alia,* (a) the structure of U.S. Steel's two-step acquisition of Marathon, (b) the adequacy of the disclosures made to Marathon shareholders at the time of U.S. Steel's first-step tender offer,[1] and (c) the adequacy of the consideration paid to Marathon shareholders in the second-step merger.

1. Plaintiffs' principal nondisclosure claim was that defendants failed to disclose two theoretical asset evaluations prepared by Marathon and its investment banker, which evaluations became known as the Strong and First Boston Reports. As the evidence at trial established, those "Reports" were not disclosed in connection with the tender offer because they were speculative, future oriented evaluations, prepared as optimistic selling tools, and were inherently unreliable and potentially misleading. After the tender offer was completed, a proxy statement was sent to Marathon's shareholders in connection with the proposed second-step merger of Marathon into U.S. Steel (the "Proxy Statement"). The merger was technically a "going private" transaction subject to SEC Rule 13e-3, 17 C.F.R. § 240.13e-3, which required disclosure of, *inter alia,* "outside appraisals," regardless of their materiality. Because the First Boston Report arguably fell within that provision of Rule 13e-3, it was disclosed in the Proxy Statement, and, under those circumstances, the Strong Report was also disclosed, with appropriate disclaimers as to reliability.

In the one and one-half years following service of the Complaint, the parties engaged in extensive pretrial proceedings. These included expedited discovery, a preliminary injunction hearing, class and merits discovery, motions for class decertification and summary judgment and, of course, preparation for trial. The case was tried to a jury in May and June 1983, with the jury rendering a verdict for defendants on all claims submitted to it.

It is undisputed that the Armstrong Group was aware of the *Radol* actions from their commencement. As class members, the Group members received the class notice sent in the Spring of 1982, informing them of their right to opt out or otherwise be bound by any judgment rendered. Despite this notice, they consciously chose not to opt out of, or intervene in, *Radol* or participate in any of the pretrial proceedings in that case. Rather, they elected to sit on the sidelines and let the *Radol* plaintiffs do all the work. It was not until well into the trial that the Armstrong Group surfaced, when it evidently asked class counsel to amend the Complaint to assert a claim, under Section 14(a) of the Securities Exchange Act of 1934 ("1934 Act"), that the Proxy Statement soliciting shareholder approval of the merger contained misrepresentations as to the reliabiliy of the Strong and First Boston Reports.[2] As is apparent from its correspondence with plaintiffs' counsel and the District Court (a copy of which is included in the Appendix, p. A6), the Armstrong Group was closely monitoring developments at the trial and had

2. Specifically, the proposed claim charged that statements that the amounts set forth in the reports were not realizable in a sale of Marathon assets were misleading.

reviewed the trial transcript. Nonetheless, it chose to act solely through the lead counsel committee.

Neither the Complaint nor the Pretrial Order contained any allegation that the description of the Strong and First Boston Reports in the Proxy Statement was deficient or materially misleading. Although this claim was inconsistent with the *Radol* plaintiffs' theory of the case, they nevertheless acceded to the Armstrong Group's request and raised with the Court their desire to make a motion to amend the Complaint. This application was made orally, without prior notice to defendants, on June 9, the day after the completion of plaintiffs' case. The Armstrong Group did not seek to intervene or otherwise participate in the motion. Counsel stated that he wished to "make a motion to amend our complaint to conform to the proof . . . ." (Tr. 1500). In response to defendants' counsels' statement that they need to know the specifics of such an amedment in order to determine whether to object, the Court agreed that plaintiffs should file a written motion and that defendants should have a chance to respond. (Tr. 1501). On June 16, the last day of trial, the *Radol* plaintiffs filed their motion to amend. They did not, however, merely seek to conform the pleadings to the proof, but, rather, sought to set forth for the first time the aforementioned claim asserting that the disclosure of the Strong and First Boston Reports in the Proxy Statement was false and misleading. On June 17 the District Court, in the exercise of its discretion, denied the motion to amend.

Afer the jury returned a verdict in favor of the defendants,[3] the class plaintiffs moved for a new trial, which motion was denied on July 22, 1983. On August 23, 1983, the class plaintiffs filed a notice of appeal.

The Armstrong Group did nothing until after the class plaintiffs filed their notice of appeal. On the last day for filing a notice of appeal, it filed in the District Court a notice of appearance and a motion to intervene for purposes of prosecuting an appeal and a notice of appeal to the Court of Appeals.[4] On September 6, 1983, the District Court denied the motion to intervene; the Armstrong Group filed a notice of appeal from that order on September 19, 1983.[5]

On appeal, the Armstrong Group sought to do a number of things. First, it argued that the District Court erred in denying the motion to amend to add a proxy claim, despite the fact that the *Radol* plaintiffs also appealed that ruling and argued the issue in their brief. The Armstrong Group

---

3. The materiality of the Strong and First Boston Reports in connection with U.S. Steel's tender offer was a key issue at trial. The evidence overwhelmingly supported the jury's conclusion that these reports were overstated and inflated sales documents, whose theoretical values bore no reasonable relationship to Marathon's fair market value or any other value the Marathon shareholders could realistically expect to receive for their shares. Based on extensive trial testimony, the jury concluded that (a) the failure to disclose these reports in the tender offer materials did not violate federal securities laws or state fiduciary principles, and (b) the consideration received by the shareholders in the merger was fair. This demonstrates the utter futility of the Armstrong Group's proposed amendment.

4. In addition to the Armstrong Group, an unrelated class member, Alfred Tjarks, who had filed a notice of appearance during trial, filed a notice of appeal.

5. Defendants moved to dismiss both appeals. The motion to dismiss the appeal on the merits was referred to the panel hearing the appeal; by a subsequent order, the Armstrong Group's appeals were consolidated with the *Radol* plaintiffs' and Tjarks' appeals.

also attempted to argue other issues raised and argued by the class representatives in their brief.[6] Finally, petitioners tried to raise issues which the class representatives had either concluded were not worth pursuing and did not address in their brief, or which the *Radol* plaintiffs chose not to raise at all and which therefore were never presented to, or addressed by, the District Court.

At oral argument on the consolidated appeals, the Court of Appeals dismissed the Armstrong Group's appeals. In doing so, the Court of Appeals rejected petitioners' contention that they had an absolute right to appeal as class members and concluded that the District Court had properly exercised its discretion in denying the motion to intervene. The Court, in announcing its decision, gave the following reasons:

> But the court is going to grant the motion to dismiss your appeal, and the reason for that is that the Federal Rules of Civil Procedure present a structure in which these class action cases are to be tried and managed. They are necessarily difficult to manage under any circumstance, and to permit the class members to come in individually after the case has been tried and pursue points on appeal, is not, we just can't contain and manage these actions and there is no precedent for that.[7]

6. This was done despite the fact that the Armstrong Group's attorney volunteered during oral argument before the Sixth Circuit that "[w]e believe the class representatives did an outstanding job presenting the issues they saw important." (Pet. App. 3a).

7. The Court in oral argument had also voiced this concern:

> The Court: You're saying that you're entitled to intervene because you want to emphasize a different issue than the Defendant's [*sic*] counsel.
>
> Armstrong Counsel: That's correct.

(footnote continued on next page)

> It's true that the court below could have granted your petition to intervene, but it did not, and we certainly can't say that Judge Rubin on that point, abused his discretion, and so, the motion filed by the Defendant Appellees to dismiss your appeal because you were not a party in the court below, is granted.[8]

(Pet. App. 4a-5a).

While petitioners assert that the Court of Appeals also ruled that it did not have discretion to permit the Armstrong Group to intervene directly at the appellate level, the Court of Appeals made clear that it did not consider that issue to be before it. When counsel for the Armstrong Group alluded to the Court of Appeals' discretion to permit intervention, the Court stated:

> You didn't ask to intervene in this court. You're appealing the District Court's judgment. So it's not a matter of our discretion.

(Pet. App. 3a). Accordingly, the Court of Appeals did not consider or decide the issue of its power to permit intervention at the appellate level.

The Court of Appeals thereafter denied rehearing *en banc*.

> The Court: Well, that way, we could have everybody in the class intervening because each of them thinks one issue is more important and have 50 lawyers up here on every appeal.

(Pet. App. 3a).

8. The Court of Appeals dismissed Tjarks' appeal for essentially the same reasons. In doing so, the Court noted that proceedings in class actions should not be conducted as "Athenian town meetings" where anyone who wanted to could get up and voice an opinion.

II.

Summary of Argument

The ruling of the Sixth Circuit neither conflicts with the decisions of other circuits nor represents any departure from the accepted and usual course of judicial proceedings. (Pet. 7). *See* Rules of the Supreme Court of the United States, Rule 17. Petitioners have cited no authority to support the proposition that a class member has an absolute right of appeal from a judgment entered in the class action whenever he has filed a post-judgment notice of appearance, and that argument is supported neither by the language nor the structure of the Federal Rules of Civil Procedure. Indeed, petitioners' position would seriously impair the effectiveness of the class action device.

Petitioners' other basis for seeking review of the Court of Appeals' decision is equally without merit. Petitioners never requested leave from the Court of Appeals to intervene at the appellate level, and the Court of Appeals therefore did not decide, as petitioners argue, that it lacked discretion to permit such intervention. There is simply no issue for this Court to review.

III.

Reasons for Denying the Writ

A. Petitioners Had No Right To Appeal The District Court's Judgment, And The Court Of Appeals Did Not Violate Constitutional Or Procedural Requirements In Dismissing That Appeal As Improper.

The first prong of petitioners' argument, that they had an absolute right to appeal from the District Court's judgment, rests on the single premise that, by filing a post-judgment notice of appearance under Rule 23(c)(2)(C), they became parties in the District Court proceeding for all purposes and with all attendant rights. (Pet. 8). That premise is without basis and is fundamentally inconsistent with the purposes behind Rule 23 and with the efficient workings of the federal courts.

In class action suits under Rule 23, the named party-plaintiffs are the representatives of the class and prosecute the action as parties on behalf of all class members. *See* Fed. R. Civ. P. 23(a) ("One or more members of a class may sue or be sued as representative parties on behalf of all . . ."). An "appearance" under Rule 23(c)(2)(C) does not give the class member the full status and rights of a party; the text of that Rule mentions neither "participation" nor "party." It simply reads: "any member who does not request exclusion may, if he desires, enter an appearance through his counsel."[9]

9. Neither this Court's decision in *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974), nor 1 Newberg, *Class Actions* §§ 1.07 *et. seq.* (2d ed. 1985), states, or even suggests, that all class members are "parties" who have a right to appeal from an adverse judgment entered on a decision on the merits. Neither even addressed that issue. The *American Pipe* decision addressed the question whether the filing of a putative class action tolled the statute of limitations as to claims of purported class members during the period before a decision denying class certification.

Nevertheless, the Armstrong Group asserts, in effect, that an appearing class member is entitled to the same rights and privileges as a named party-plaintiff, including, specifically, the right to appeal. But that novel contention would render Rule 24 intervention meaningless in class actions. Newberg, the commentator whom the Armstrong Group cites (Pet. 9), acknowledges that the "this entry of appearance [under Rule 23(c)(2)(C)] does not constitute an intervention and does not confer an intervenor's rights on the party." 4 Newberg, *Class Actions* § 22.64 at 126 n.298 (2d ed. 1985).

Professor (later Justice) Kaplan, the reporter for the Advisory Committee on Civil Rules which drafted the 1966 amendments to Rule 23, including what is now Rule 23(c)(2)(C), confirms that the provision was never intended to replace Rule 24 intervention as the mechanism for achieving party status. Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (1)*, 81 Harv. L. Rev. 356, 392 n.137 (1967):

> If "appearance" is read as enabling the class member to be admitted automatically into the action as a party, it would stand in odd contrast to intervention in the action under rule 24, which is not automatic and requires a showing.

See also Ramsey v. *Arata*, 406 F. Supp. 435, 442 (N.D. Tex. 1975) (agreeing with Prof. Kaplan's reading of Rule 23(c)(2)(C)).

Indeed, the Armstrong Group implicitly admitted this by its actions in the trial court. Although they now argue that the filing of an appearance alone was sufficient to permit them to appeal, at the same time that they filed

their appearance in the District Court, they moved for leave to intervene. The sole reason for the requested intervention was in order to prosecute an appeal. If, as they now contend, the notice of appearance empowered petitioners to appeal, the motion to intervene was superfluous, for it merely requested a right that, under their present theory, they already possessed.[10]

---

10. Petitioners' reluctance to challenge the District Court's denial of leave to intervene is hardly surprising. That denial was a proper exercise of the District Court's discretion for several reasons. The most obvious is that the motion was untimely. Timeliness is, of course, a requirement for both intervention as of right and permissive intervention. *NAACP* v. *New York*, 413 U.S. 345, 365 (1973). The Courts of Appeals have been extremely reluctant to grant post-judgment intervention and have required a strong showing by the parties seeking intervention of their entitlement to relief. *E.g.*, *Delaware Valley Citizens' Council* v. *Commonwealth of Pennsylvania*, 674 F.2d 970, 974 (3d Cir. 1982); *United States* v. *Associated Milk Producers, Inc.*, 534 F.2d 113, 116 (8th Cir.), *cert. denied*, 429 U.S. 940 (1976). In this case, the Armstrong Group offered no tenable excuse for the delay in seeking to intervene. As members of the Marathon Shareholders' Committee, which actively opposed the merger of Marathon into U.S. Steel, they were unquestionably aware of the commencement of the *Radol* action in early 1982 and of the efforts of the plaintiffs in *Radol* to enjoin preliminarily the merger of Marathon into U.S. Steel. They subsequently were notified of the class certification decision and of their rights as class members. Nonetheless, the members of the Armstrong Group made no effort to intervene or even to enter an appearance under Rule 23(c)(2)(C) in the action prior to or during trial, although, as their correspondence in the Appendix (p. A6) demonstrates, they were fully aware of developments at trial. Nor is there present any circumstance, such as a failure of the class representatives to file an appeal, *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385 (1977), which could have excused this untimely attempt to intervene.

Moreover, under Rule 24(a), a finding of inadequate representation is a prerequisite to intervention as of right. The burden of proof rests on the party seeking intervention, *Trbovich* v. *United Mine Workers*, 404 U.S. 528 (1972), and the cases have required a compelling showing of inadequacy to meet that burden. *E.g.*, *Stadin* v. *Union Elec. Co.*, 309 F.2d 912, 919 (8th Cir. 1962), *cert. denied*, 373 U.S. 915 (1963). *See Delaware Valley Citizens' Council* v. *Commonwealth of Pennsylvania*, 674 F.2d 970, 973 (3d Cir. 1982).

(footnote continued on next page)

None of the cases cited by petitioners supports their current position. Every case cited for the proposition that class members "have standing to appeal from adverse decisions and object to settlements" is in fact a case where class members had, in response to a Rule 23(e) settlement notice, appeared and raised objections to a proposed settlement. Those cases are inapposite. In the first instance, in the settlement cases cited by petitioners, because the class representatives have supported the settlement or compromise, there will be no appeal of the settlement unless those class members who have raised objections to it are permitted to prosecute an appeal from the rejection of their objections. In this case, the class representatives have vigorously pursued an appeal from the adverse judgment entered in the District Court. Thus, petitioners here do not seek to appeal a decision which will, absent their appeal, never be reviewed. Rather, they are merely attempting to second guess the class representatives in their prosecution of that appeal.

Moreover, even in the settlement context, actual appearance and participation is the *sine qua non* of an objecting

---

The Armstrong Group made no such showing here. There was no charge of collusion or conflict of interest or incompetence on the part of the lead counsel committee. To the contrary, the trial court not only determined at the time of class certification that the named plaintiffs "will fairly and adequately protect the interests of the class" (Rule 23(a)(4)) but, on several occasions during the trial, unqualifiedly praised the handling of the case by the lead counsel committee: "I think the representation the class Plaintiffs are receiving is outstanding. I don't see any reason to add to or supplement Plaintiffs' counsel." (Tr. 1314; *accord* Tr. 1500-01, 2290). Nor did the Armstrong Group seriously contest the adequacy of representation by class counsel. At oral argument in the Sixth Circuit, counsel for the Armstrong Group acknowledged that "the class representatives did an outstanding job presenting the issues that they saw important. . . ." (Pet. App. 3a).

class member's right to appeal from the settlement. In *Research Corp.* v. *Asgrow Seed Co.*, 425 F.2d 1059, 1060-61 (7th Cir. 1970) (Pet. 9), unnamed members of a defendant class had failed to raise any objection to a consent judgment and took no action until after the settlement negotiated by the parties had been approved by the District Court. While the Court of Appeals noted that a class member who intervenes or "appears in response to a notice pursuant to Fed R Civ P 23(e) and objects to the dismissal or compromise . . . has a right to appeal from an adverse judgment," it dismissed the appeal because "[a] person in disagreement with the terms of a settlement must take, at least, these minimal steps to preserve his right to appeal." Much like the class members in that case, the Armstrong Group in this case did nothing until eight weeks after judgment was entered.

The procedure envisioned by petitioners is contrary to the structure of the Federal Rules of Civil Procedure and the rationale of the procedural devices available for handling complex class action litigation. The multiple devices of transfer under 28 U.S.C. § 1404, consolidation under Fed. R. Civ. P. 42(a), class action certification under Rule 23(b)(3), and appointment of lead counsel pursuant to Rules 23(d) and 42(a) were designed to permit the handling of actions such as the present one with a maximum of convenience, economy and expedience. *See generally In re Air Crash Disaster*, 549 F.2d 1006 (5th Cir. 1977). The use of these devices in the *Radol* case permitted 13 alleged class actions, brought in many different districts, by different counsel and asserting different theories of recovery,

to be unified for pretrial and trial purposes and to be brought to trial and decided within 18 months after filing.

There can be no doubt that the use of these devices limits to some extent the power of an individual included within a class action to control the prosecution of that action. However, even the limitations contemplated by these devices are carefully circumscribed. Rule 23(b)(3) requires explicit consideration by the court of the individual's interest in pursuing his own claims, as well as the difficulties likely in the management of a class action. In the instant case, such determinations were made by the District Court before ordering consolidation and certification.

Moreover, Rule 23 clearly provides that notice is required in any class action maintained under subdivision (b)(3), that such notice is to advise each member that the court will exclude him from the class if he so requests by a specified date, and that any member who does not request exclusion may, if he desires, enter an appearance through his counsel. Thus, class members who wish to play a more active role are given various alternatives, including the right to maintain their own individual suits if they so desire. Here, both personal and published notice was given. That notice informed class members of the procedures by which they could opt out of the class and that the class would be represented by the lead counsel committee.

Rule 23(c)(2)(A) places an affirmative duty on the class member to act in order to exercise the right to exclusion from the class, and expressly limits the life span of that right. Language requiring an exclusion "if he so requests by a specified date," was added to the Rule to prevent

"sideline sitting," *i.e.*, "delaying . . . decision about whether to join the action until the case reaches judgment." *Robinson* v. *Union Carbide Corp.*, 544 F.2d 1258, 1262 (5th Cir.) (Wisdom, J., concurring), *cert. denied*, 434 U.S. 822 (1977). This Court has interpreted this language to mean that: "[P]otential class members retain the option to participate in or withdraw from the class action only until a point in the litigation 'as soon as practicable after the commencement' of the action . . . and they are sent notice of their inclusion within the confines of the class." *American Pipe & Construction Co.* v. *Utah, supra*, 414 U.S. at 549. Once notice has been received, the class member has an affirmative duty "to take note of the suit or to exercise any responsibility with respect to it in order to profit from the eventual outcome of the case." *Id.* at 552.

The affirmative duty to opt out within a specified period of time is necessary in order to allow defendants to make a reasonable appraisal of the dimensions of the suit they are facing. It is also a reflection of the overall structure of Rule 23 allowing class members to remain passive. In addition, "[b]y not excluding themselves from the class . . . class members must be deemed to recognize and yield to the need for a unified representative effort in behalf of all members of the class so that the litigation may proceed in an orderly fashion." Newberg, *Orders in the Conduct of Class Actions: A Consideration of Subdivision (d)*, 10 B.C. Indus. & Com. L. Rev. 577, 588 (1969).

The Armstrong Group neither opted out of the class nor took advantage of its right to attempt to intervene at any time before judgment. Instead, it "sat on the sidelines," while the case proceeded through a preliminary

injunction hearing, extensive discovery, two sets of summary judgment motions, a pretrial order and, indeed, through trial, verdict, the entry of judgment and post-trial motions.

One of the principal considerations of the Advisors in redrafting Rule 23 in 1966 was to eliminate "one-way intervention"—that is, the practice of class members who "sit on the sidelines" and only become parties to the action after a judgment favorable to the class has been entered. Advisory Committee Note, 39 F.R.D. 69 (1966); *American Pipe & Construction Co.* v. *Utah, supra*, 414 U.S. at 547. What the Armstrong Group hopes to accomplish here is a new version of "one-way intervention." Only after judgment had been entered against the class did that Group seek to intervene to assert a new theory of recovery and to request a retrial. Repetitious litigation of this type is just the sort of result that the consolidation, appointment of lead counsel, and class action certification techniques were designed to prevent. As the Court of Appeals properly recognized, the result sought by petitioners here would make it impossible for the courts to manage and control class action litigation and would vitiate the carefully structured provisions of the federal rules.[11]

---

11. The fact that four rather than 50 class members sought to separately prosecute two additional appeals in this case (Pet. 9) hardly eliminates the problem. Indeed, even the two additional appeals posed significant management problems—they tripled the volume of briefs before the Court and presented a number of issues which, although meritless, had never been raised at any stage of the litigation.

B. Petitioners Failed To Request Permission From The Court Of Appeals To Intervene In The Appeal And Did Not Offer Any Grounds That Would Have Supported Intervention.

The second ground offered by the petitioners for a writ of certiorari is plainly misconceived, for it invites this Court to review an issue that was not decided below. The Armstrong Group never sought permission from the Court of Appeals to intervene in the appeal, and the Court of Appeals did not decide whether it had the power to grant intervention or the circumstances in which it would do so. This is clear from the transcript of oral argument. In response to a suggestion by petitioners' counsel that the Court of Appeals had discretion to permit intervention, the Court noted: "You didn't ask to intervene in this court. You're appealing the District Court's judgment. So it's not a matter of our discretion."[12] Petitioners' counsel did not disagree or point to any request for intervention. Even when the Court of Appeals specifically asked petitioners' counsel "why do we have discretion?" counsel did not point to any request to intervene in the Court of Appeals or at that point make a request to intervene.[13] The Court in announcing its decision made no mention of the issue.

---

12. Thus, the Court of Appeals did not say during oral argument, as petitioners suggest, that "it had no independent discretion to allow petitioners' appellate appearance." (Pet. 12 n.7). It merely stated that petitioners had never made a proper request of the Court to grant such relief and that the question of its discretion was not at issue.

13. Petitioners' efforts to excuse the lack of a request (Pet. 12, n.7) miss the point. Petitioners do not seek review of the Court of Appeals' decision not to consider intervention absent a request by petitioners that it do so. Rather they seek review of an issue—whether the Court had power to permit a non-party to intervene in an appeal—which was never raised in, or decided by, the Court of Appeals.

Because the Sixth Circuit did not address the issue of its power to permit intervention, this issue is not an appropriate subject for this Court's review.[14] As this Court has repeatedly held, it will not consider issues that were not raised or considered in the lower court. *E.g., Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."); *Kosak* v. *United States*, 465 U.S. 848, 850 n.3 (1984) ("Because petitioner did not present this argument to the Court of Appeals, we decline to consider it."); *Rogers* v. *Lodge*, 458 U.S. 613, 628 n.10, *reh'g denied*, 459 U.S. 899 (1982) ("This contention was not properly raised in the Court of Appeals and was not addressed by that court. We therefore do not address it.").

Even if they had brought the issue before the Court of Appeals, petitioners did not demonstrate that intervention should have been granted. While petitioners cite no federal authority in which such relief was in fact granted at the appellate level,[15] the cases cited do make clear that, if intervention is available at all, it may be permitted "[o]nly in an exceptional case for imperative reasons. . . ." *McKenna* v. *Pan American Petroleum Corp.*, 303 F.2d 778, 779 (5th Cir. 1962) (Pet. 13).

---

14. Petitioners' purported conflict of the Sixth Circuit's decision with other Courts of Appeals' decisions suggesting that there is power to permit intervention is, of course, nonexistent for the same reason.

15. Neither *Overby* v. *United States Fidelity & Guaranty Co.*, 224 F.2d 158, 162 (5th Cir. 1955), nor *Preston* v. *United States*, 284 F.2d 514 (9th Cir. 1960) (Pet. 13-14), presented the issue. The courts in *Holland* v. *Board of Public Instruction*, 258 F.2d 730 (5th Cir. 1958), and *McKenna* v. *Pan American Petroleum Corp.*, 303 F.2d 778 (5th Cir. 1962) (Pet. 12, 13), denied requests to intervene at the appellate level.

Such a showing is absent here. Petitioners do not challenge the adequacy of representation by lead counsel at the trial level. They argue only that their interests were not being adequately represented at the appellate level. The essence of that claim is not that counsel in *Radol* failed to present effectively the principal arguments addressed on appeal but that more emphasis could have been given to some issues and that there are other issues that should have been addressed. More specifically, the Armstrong Group sought to repeat in its brief the claim, argued by the *Radol* plaintiffs in their appellate brief, that the trial court improperly denied the *Radol* plaintiffs' request for leave to amend the Complaint at the end of their case, as well as various other claims addressed by the *Radol* plaintiffs.

While many of the points sought to be raised by petitioners were repetitious or, at most, semantic variations of issues submitted to the jury, decided adversely to the class, and appealed by the class representatives, the Armstrong Group also sought to raise issues that were never presented to the District Court—and therein lies the true motive (and real vice) of its belated efforts. Thus, petitioners sought to assert myriad violations of Rule 13e-3 that were raised for the first time on appeal and to argue the purported invalidity of the merger on grounds that were never raised below. None of these new claims was part of the record in the District Court, and, thus, the claims were not properly before the Court of Appeals.[16]

16. It is axiomatic that issues not raised before the District Court cannot be raised on appeal. *E.g., Guy* v. *Robbins & Myers, Inc.*, 525 F.2d 124 (6th Cir. 1975), *rev'd on other grounds sub nom. International Union of Electrical, Radio & Machine Workers* v. *Robbins & Myers, Inc.*, 429 U.S. 229 (1976). *See generally* 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* § 3956 at 386 (1977) & 277 (Supp. 1985); 9 J. Moore, B. Ward & J. Lucas, *Moore's Federal Practice* ¶ 210.04[1] at 10-15 (2d ed. 1985).

This is a classic case of second guessing the tactics employed by lead counsel and cannot form a basis for a finding of inadequate representation. It has repeatedly been held that mere differences of opinion as to the handling of the prosecution or defense of an action, in the absence of indications of incompetence, are insufficient to demonstrate inadequacy of representation. *Gustave* v. *United States,* 627 F.2d 901, 904 (9th Cir. 1980) ("Mere criticism of a tactic or strategy is not in itself sufficient to support a charge of inadequacy of representation."); *Bumgarner* v. *Ute Indian Tribe of Uintah & Ouray Reservation,* 417 F.2d 1305, 1308 (10th Cir. 1969) ("Appellants do not question the competency of the . . . attorney . . . [but they] apparently would have handled the defense of the case differently. . . . This however is not sufficient to challenge the adequacy of representation.); *Stadin* v. *Union Electric Co.,* 309 F.2d 912, 919 (8th Cir. 1962), *cert. denied,* 373 U.S. 915 (1963) ("Mere difference of opinion among attorneys is not of itself inadequate representation. If it were, intervention of right would become almost automatic.").

Here, lead counsel made a strategic decision not to challenge the disclosures in the Proxy Statement. While that decision may be at odds with what the Armstrong Group in hindsight thinks should have been done, it can hardly serve as the basis for a claim of inadequate representation.

In essence, what petitioners are seeking here is a "free ride" on the efforts of the named plaintiffs. The result they seek, if adopted, would permit *any* member of a properly certified class to appear suddenly on appeal to challenge an adverse determination or to add new claims or causes of action, merely by complaining about the adequacy of repre-

sentation on the appeal. Such a result would seriously undermine the efficacy of class action litigation, would create manageability problems for district and appellate courts, would eviscerate the opt-out provisions of Rule 23, and would inundate appellate and trial courts with a constant barrage of criticisms and suggestions by well-intentioned but inadequately informed class members who themselves have not been active participants in the action, who have not subjected themselves to discovery and who cannot themselves satisfy the requirements of Rule 23.

Quite simply, petitioners' rights were amply protected by the opt-out provision of Rule 23(c)(2)(A), by the notice sent to all class members and by the availability of Rule 24 intervention. Given these opportunities to proceed on their own, petitioners voluntarily chose to waive those rights and instead elected to avail themselves of the considerable benefits of class member status. They should not be heard now to complain that they should have it both ways.

IV.

Conclusion

For the foregoing reasons, the Petition for a Writ of Certiorari to the Court of Appeals for the Sixth Circuit should be denied.

Respectfully submitted,

HALIBURTON FALES, 2d*
RICHARD J. HOLWELL
THOMAS MCGANNEY
RICHARD W. REINTHALER
DWIGHT A. HEALY

WHITE & CASE
1155 Avenue of the Americas
New York, New York 10036
(212) 819-8200

JOHN W. BEATTY
DINSMORE & SHOHL
2100 Fountain Square Plaza
Cincinnati, Ohio 45202
(513) 621-6747

Attorneys for Respondents: United States Steel Corporation, et al.

ERWIN N. GRISWOLD
JOHN L. STRAUCH*
JOHN M. NEWMAN, JR.
ROBERT R. WELLER
JOHN W. EDWARDS II
JAMES R. JOHNSON

JONES, DAY, REAVIS & POGUE
1700 Huntington Building
Cleveland, Ohio 44115
(216) 348-3939

Attorneys for Respondents: Marathon Oil Company, et al.

* *Counsel of Record.*

Dated: March 1, 1986

APPENDIX

Rule 23. Class Action

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do

not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favoable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims

or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Rule 24. Intervention

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or

defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C. § 2403.

LETTERHEAD OF

WILLIAMS & CONNOLLY

June 8, 1983

Melvyn I. Weiss, Esquire
Milberg, Weiss, Bershad & Specthrie
One Pennsylvania Plaza
New York, New York 10119

Dear Mel:

We are writing on behalf of the members of the Marathon Shareholders Committee who are also members of the class in your Marathon suit and who have been disqualified from the Shareholders Committee's appraisal action in the Findlay, Ohio, Common Pleas Court. Among the Committee members who we represent in this matter is John Fedor, Jr., of New Jersey.

Specifically, we request you to petition the court to amend your complaint to conform to the proof by adding the following allegations:

1. The paragraph on page 13 of the Marathon "merger" proxy statement of February 8, 1982, which states:

> "The net asset values discussed in the (First Boston) Report, the (Strong) Evaluation and the (First Boston) Summary were not viewed by Marathon's Board of Directors as being reflective of, and do not represent, per share values that could realistically be expected to be received by Marathon or its shareholders in a negotiated sale of the Company as a going concern or through liquidation of the Company's assets."

was false, the defendants knew it was false, the defendants intended to deceive the shareholders, the shareholders relied on the statement, the shareholders were deceived, and this conduct violated the securities laws and the result was that the shareholders were damaged.

2. The defendant Marathon directors breached their fiduciary obligations by entering into—and recommending to shareholders—a merger agreement that sold the Marathon Oil Company for slightly over $6 billion when the Company's assets in a liquidation or partial liquidation were worth as much as $14 billion.

Page 720 line 23 of the trial transcript establishes that Marathon management considered Marathon's interest in the Yates Field to be 20 percent of Marathon's asset value. In addition, it was established (trial transcript page 204 line 17) Marathon management considered the $2.8 billion option granted U.S. Steel for Marathon's interest in the Yates Field the minimum acceptable option price. The reasonableness of the $2.8 billion price was confirmed (see trial transcript page 209 line 13) by First Boston. The 20 percent share of Marathon's asset value represented by the Yates property coupled with a value for the Yates property of $2.8 billion suggests Marathon was valued by its management at five times the $2.8 billion value placed on Yates or in the neighborhood of $14 billion.

First Boston on page 2 of their Marathon valuation report estimates Marathon's net equity value is between $11.070 and $13.249 billion. This suggests that while Marathon management was valuing Marathon assets at approximately $14 billion, the highest value First Boston placed on the Company was less—$13.249 billion, and thus, obviously in the eyes of management reflective of asset value.

Again we emphasize that the allegations contained in the amendments to the complaint we are requesting have already been proved. We are not requesting you to add anything new, or to extend the trial. The proof of the additional allegations are in the trial record. However, on the basis of your conversation with Mr. McElroy, it is clear that you did not contemplate this allegation nor are they contained within your complaint.

Sincerely,

/s/ Donald E. Schwartz

Donald E. Schwartz

/s/ Paul Martin Wolff

Paul Martin Wolff

cc: Jacob K. Stein, Esq.
Paxton & Seasongood

Stuart Savett, Esq.
Savett, Marion & Graf, P.C.

Stanley R. Wolfe, Esq.
Berger and Montague, P.C.

DES/bb